

# Securities Update

## The Amended Rule 12g3-2(b) Exemption for Foreign Private Issuers

On September 5, 2008, the US Securities and Exchange Commission (the "SEC") adopted amendments to Rule 12g3-2(b) which exempts foreign private issuers from registering their equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") based on the availability of specified information and the satisfaction of certain other conditions. The amendments to Rule 12g3-2(b) become effective on October 10, 2008.<sup>1</sup>

### Overview

The amendments significantly simplify the process of relying on Rule 12g3-2(b) by eliminating the requirement to furnish an initial application to the SEC, replacing paper submissions to the SEC with electronic publication on a foreign private issuer's Internet Web site (or through an electronic information delivery system generally available in the foreign private issuer's primary trading market) and clarifying the English translation requirements. The amendments also eliminate restrictions that delay or prohibit foreign private issuers from relying on the 12g3-2(b) exemption if they previously exited the Exchange Act reporting regime other than pursuant to Rule 12h-6. In addition, the amendments add a new foreign listing requirement that at least 55 percent of the average daily trading volume of the subject class of securities have occurred on exchanges located within one or two non-US jurisdictions during a foreign private issuer's most recently completed fiscal year.

Rule 12g3-2(b) permits a foreign private issuer's equity securities to trade on a limited basis in the over-the-counter market in the United States without compliance with Exchange Act reporting requirements.<sup>2</sup> Rule 12g3-2(b) exemptions are typically obtained by foreign private issuers to establish an unlisted depository facility for American Depositary Receipts (ADR) in the United States.<sup>3</sup> The amendments to Rule 12g3-2(b) are expected to encourage the establishment of ADR facilities by significantly reducing the related costs of relying on the exemption. For foreign private issuers who already electronically publish the information required by Rule 12g3-2(b) (due to the requirements of their home jurisdiction, securities exchange or otherwise), exemption under Rule 12g3-2(b) will be automatic, so long as they satisfy the new foreign listing requirement and do not have current

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- <sup>1</sup> The final amendments (Release No. 34-58465) are substantially similar to the proposed amendments published in February 2008 (Release No. 34-57350), with the exception that a proposal to require the average daily trading volume in the subject class of securities in the United States to be no greater than 20 percent of the average daily trading volume on a worldwide basis was not adopted.
  - <sup>2</sup> Any trading of a foreign private issuer's Rule 12g3-2(b) exempt securities in the United States would have to occur through an over-the-counter market such as that maintained by the Pink Sheets, LLC. The NASD requires foreign private issuers to register a class of securities under Section 12 of the Exchange Act before they can be traded through the electronic over-the-counter bulletin board administered by Nasdaq.
  - <sup>3</sup> A Form F-6 must be filed with the SEC in order to establish an ADR facility. To be eligible for use of a Form F-6 the issuer of the deposited securities must either have reporting obligations under Section 13(a) of the Exchange Act or an exemption under Rule 12g3-2(b).

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reporting obligations under Sections 13(a) or 15(d) of the Exchange Act (that is, reporting obligations related to listing securities on a US securities exchange or engaging in a public offering of securities in the US). The automatic availability of Rule 12g3-2(b) for certain foreign private issuers will allow depositaries to establish unsponsored ADR facilities without the consent or participation of such issuers.<sup>4</sup>

Most foreign private issuers who currently rely on Rule 12g3-2(b) are expected to be able to maintain their exemption under the amended rule. However, the amendments establish a transitional period to accommodate a currently exempt foreign private issuer who is unable to satisfy the new requirements of amended Rule 12g3-2(b) and would otherwise become subject to Exchange Act registration as a result. Such a foreign

private issuer will not be required to register the subject class of securities under the Exchange Act or make any related Exchange Act filings until October 10, 2011. The amendments also establish a transitional period for purposes of the electronic publication requirement, pursuant to which the SEC will continue to process paper submissions under Rule 12g3-b(2) until January 10, 2009.

### Satisfying the Requirements of Amended Rule 12g3-2(b)

Below is a summary of the requirements a foreign private issuer must satisfy to rely on Rule 12g3-b(2), both in its current form and as amended.

Current Rule 12g3-2(b)	Amended Rule 12g3-2(b)
<b>Application to the SEC</b>	<b>Application to the SEC</b>
<p>To establish the exemption, a foreign private issuer must submit an application to the SEC containing the following:<sup>5</sup></p> <ul style="list-style-type: none"> <li>■ A letter notifying the SEC that it is relying on the 12g3-2(b) exemption</li> <li>■ An index of the Non-US Disclosure Documents (referred to below) it is furnishing to the SEC</li> <li>■ An explanation of when and by whom each such Non-US Disclosure Document is required to be made public or distributed to security holders</li> <li>■ The number of US holders of the subject securities, the amount and percentage held by them, as well as a brief description of how they acquired the securities</li> <li>■ The date and circumstances of the most recent public distribution of the subject securities by the issuer or its affiliates.</li> </ul>	<p>The amendments eliminate the requirement to submit an application to the SEC to establish the exemption.</p>

<sup>4</sup> For unsponsored ADR facilities, Form F-6 has been amended to permit a Form F-6 filer to base its representation that the issuer publishes information required by Rule 12g3-2(b) upon a reasonable, good faith belief after exercising reasonable diligence. The SEC solicited comment on, but did not adopt, a requirement that depositaries receive the consent of a foreign private issuer before establishing unsponsored ADR facilities.

<sup>5</sup> The current rule does not require foreign private issuers who obtained the Rule 12g3-2(b) exemption upon termination of Exchange Act registration pursuant to Rule 12h-6 to submit an application to the SEC.

Current Rule 12g3-2(b)	Amended Rule 12g3-2(b)
<p><b>Availability of Information Published Outside the United States or Distributed to Security Holders</b></p> <p><b>Initial submission:</b><sup>6</sup> A foreign private issuer must submit to the SEC with its application, in paper, the following “Non-US Disclosure Documents” going back to the beginning of its most recently completed fiscal year:</p> <ul style="list-style-type: none"> <li>■ What has been made public, or been required to be made public, under the laws of its jurisdiction of incorporation, organization or domicile</li> <li>■ What has been filed, or been required to be filed, with the principal stock exchange in its primary market on which its securities are traded and which has been made public by that exchange</li> <li>■ What has been distributed, or is required to be distributed, to its security holders.</li> </ul> <p><b>Ongoing submissions:</b> A foreign private issuer must, on an ongoing basis, either (i) submit its Non-US Disclosure Documents to the SEC or (ii) publish its Non-US Disclosure Documents on its Internet Web site or through an electronic delivery system generally available to the public in its primary trading market.<sup>7</sup> The information must be submitted or published “promptly” after it has been made public.<sup>8</sup></p> <p><b>English translations:</b> The current rule does not generally specify when full English translations of Non-US Disclosure Documents are required, as opposed to English versions or summaries. However, in administering the rule, the SEC staff has typically required foreign private issuers to provide, at a minimum, full English translations of the following:</p> <ul style="list-style-type: none"> <li>■ Annual reports, including financial statements</li> <li>■ Interim reports that include financial statements</li> <li>■ Press releases</li> <li>■ All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.<sup>9</sup></li> </ul> <p><b>Materiality threshold:</b> Only Non-US Disclosure documents that are material to an investment decision are required to be submitted to the SEC or electronically published.<sup>10</sup></p>	<p><b>Availability of Information Published Outside the United States or Distributed to Security Holders</b></p> <p>The amendments do not change the types of information that must be made available under the rule.</p> <p>The amendments do make the following significant changes:</p> <ul style="list-style-type: none"> <li>■ <b>Electronic publication replaces paper submissions:</b> Foreign private issuers are required to electronically publish Non-US Disclosure Documents on either their Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. In the case of ADR facilities, the related F-6 registration statement must disclose the address of the Internet Website or electronic information delivery system. Paper submissions will not be accepted by the SEC after January 10, 2009.</li> <li>■ <b>No initial publication where exemption obtained upon exiting Exchange Act reporting regime:</b> Foreign private issuers who obtained the Rule 12g3-2(b) exemption upon exiting the Exchange Act reporting regime pursuant to Rule 12g-4 or 12h-3 under, or Section 15(d) of, the Exchange Act, are not required to publish their Non-US Disclosure Documents going back to the beginning of their most recently completed fiscal year (on the theory that any material information for that period would already be publicly disclosed in previously filed Exchange Act reports).<sup>11</sup></li> <li>■ <b>English translation requirement clarified:</b> <ul style="list-style-type: none"> <li>– The amendments codify the SEC staff’s position regarding which Non-US Disclosure Documents must, at a minimum, be translated fully into English (see summary of SEC staff position in “Current Rule 12g3-2(b)” column)</li> <li>– The adopting release also states that, generally, a foreign private issuer may provide English summaries to the extent such a summary would be permitted for a document submitted under cover of Form 6-K or Exchange Act Rule 12b-12(d)(3).</li> </ul> </li> </ul>

6 In March 2007, Rule 12g3-2(b) was amended to provide that foreign private issuers who obtained the Rule 12g3-2(b) exemption upon termination of Exchange Act registration pursuant to Rule 12h-6 were not required to make this initial submission (on the theory that any material information for that period would already be publicly disclosed in previously filed Exchange Act reports).

7 The current rule *requires* foreign private issuers who obtained the Rule 12g3-2(b) exemption upon termination of Exchange Act registration pursuant to Rule 12h-6 to electronically publish their Non-US Disclosure Documents instead of submitting them in paper to the SEC.

8 The SEC staff has indicated that what constitutes “promptly” depends on the type of document and the amount of time required to prepare an English translation or summary. The SEC staff typically requires material press releases to be submitted or published on or around the same business day of original publication.

9 The current rule expressly requires foreign private issuers who maintain the 12g-3b(2) exemption through ongoing electronic publication of Non-US Disclosure Documents to, at a minimum, publish English translations of these documents.

10 The current rule provides the following as examples of material information: results of operations and financial condition, changes in business, acquisition or disposition of assets, issuance, redemption or acquisition of securities, changes in management or control, granting of options or other payment to directors or officers, and transactions with directors, officers or principal security holders.

11 In March 2007, Rule 12g3-2(b) was amended to provide that no initial submission or publication of Non-US Disclosure Documents was required with respect to foreign private issuers who obtained the Rule 12g3-b(2) exemption upon termination of Exchange Act registration pursuant to Rule 12h-6. The newly adopted amendments similarly amend Rule 12g3-2(b) with respect to foreign private issuers who previously exited the Exchange Act reporting regime pursuant to Rule 12g-4 or 12h-3 under, or Section 15(d) of, the Exchange Act.

Current Rule 12g3-2(b)	Amended Rule 12g3-2(b)
<p data-bbox="261 487 688 516"><b>No Exchange Act Reporting Obligations</b></p> <p data-bbox="261 541 841 625">The Rule 12g3-2(b) exemption is unavailable to a foreign private issuer who has current reporting obligations under Sections 13(a) or 15(d) of the Exchange Act.<sup>12</sup></p> <p data-bbox="261 646 841 730">The Rule 12g3-2(b) exemption is also unavailable to foreign private issuers who have exited the Exchange Act reporting regime pursuant to Rule 12g-4 or 12h-3 under, or Section 15(d) of, the Exchange Act, if:<sup>13</sup></p> <ul data-bbox="261 751 841 982" style="list-style-type: none"> <li data-bbox="261 751 841 804">■ They had reporting obligations under Section 13(a) of the Exchange Act anytime during the prior 18 months</li> <li data-bbox="261 825 841 877">■ They had reporting obligations under Section 15(d) of the Exchange Act at anytime in the past (whether or not they have been suspended)</li> <li data-bbox="261 898 841 982">■ They succeeded to reporting obligations under Section 13(a) or 15(d) of the Exchange Act as a result of the acquisition of a company registered under the Exchange Act.</li> </ul>	<p data-bbox="901 487 1328 516"><b>No Exchange Act Reporting Obligations</b></p> <p data-bbox="901 541 1503 594">The amendments retain the requirement that foreign private issuers have no current reporting obligations under Sections 13(a) or 15(d) of the Exchange Act.</p> <p data-bbox="901 615 1503 730">The amendments eliminate the restrictions that delay or prohibit foreign private issuers from relying on the Rule 12g3-b(2) exemption if they previously exited the Exchange Act reporting regime pursuant to Rule 12g-4 or 12h-3 under, or Section 15(d) of, the Exchange Act.<sup>14</sup> Under the amendments:</p> <ul data-bbox="901 751 1503 993" style="list-style-type: none"> <li data-bbox="901 751 1503 867">■ Foreign private issuers who suspend their Exchange Act reporting obligations pursuant to Rule 12g-2 or 12h-3 will satisfy the no current Exchange Act reporting requirement upon the effectiveness of their Exchange Act deregistration (i.e., 90 days after they file a Form 15)</li> <li data-bbox="901 888 1503 993">■ A foreign private issuer who suspends its Exchange Act reporting obligations pursuant to Section 15(d) will satisfy the no current Exchange Act reporting requirement upon its determination that it had less than 300 shareholders at the beginning of its most recent fiscal year.</li> </ul>
<p data-bbox="261 1018 488 1047"><b>120 Day Requirement</b></p> <p data-bbox="261 1073 841 1272">A foreign private issuer must assert the 12g3-2(b) exemption by submitting its application and initial Non-US Disclosure Documents to the SEC within the statutory 120 day period for filing a registration statement under Section 12(g) of the Exchange Act (i.e., no later than 120 days after the end of a fiscal year where it has a class of equity securities held by 500 record holders (300 of whom are US residents) and where its total assets exceed US\$10 million).</p>	<p data-bbox="901 1018 1128 1047"><b>120 Day Requirement</b></p> <p data-bbox="901 1073 1484 1157">The amendments eliminate the requirement to assert the exemption within the statutory 120 day period for filing a registration statement under Section 12(g) of the Exchange Act.</p>
<p data-bbox="261 1295 683 1325"><b>Primary Trading Market Outside the US</b></p> <p data-bbox="261 1350 456 1379">No related requirements.</p>	<p data-bbox="901 1295 1323 1325"><b>Primary Trading Market Outside the US</b></p> <p data-bbox="901 1350 1503 1465">The amendments require a foreign private issuer to maintain a listing of the subject class of securities on securities exchanges located within one or two non-US jurisdictions that in the aggregate constitutes the “primary trading market” for the subject class of securities.</p> <p data-bbox="901 1486 1503 1623">“Primary trading market” is defined to mean that at least 55 percent of the average daily trading volume in the subject class of securities occurred on securities exchanges within one or two non-US jurisdictions during a foreign private issuer’s most recently completed fiscal year (and at least one non-US jurisdiction has a greater average daily trading volume than in the US.)</p> <p data-bbox="901 1644 1503 1696">A foreign private issuer will need to confirm it satisfies this new requirement on an annual basis.</p>

12 A foreign private issuer could have Section 13(a) or 15(d) reporting obligations if it previously listed securities on a US securities exchange or engaged in a public offering of securities in the US.

13 In March 2007, Rule 12g3-2(b) was amended to eliminate these restrictions for foreign private issuers who previously exited the Exchange Act reporting regime pursuant to Rule 12h-6.

14 In March 2007, Rule 12g3-2(b) was amended to eliminate these restrictions for foreign private issuers who previously exited the Exchange Act reporting regime pursuant to Rule 12h-6. The newly adopted amendments similarly amend Rule 12g3-2(b) with respect to foreign private issuers who previously exited the Exchange Act reporting regime pursuant to Rule 12g-4 or 12h-3 or Section 15(d), of the Exchange Act.

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